



Senate

General Assembly

File No. 267

January Session, 2001

Substitute Senate Bill No. 1115

Senate, April 12, 2001

The Committee on Judiciary reported through SEN. COLEMAN of the 2nd Dist., Chairperson of the Committee on the part of the Senate, that the substitute bill ought to pass.

AN ACT CONCERNING INVESTIGATIVE SUBPOENAS.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

1 Section 1. (NEW) For the purposes of sections 1 to 12, inclusive, of
2 this act:

3 (1) "Prosecuting official" means the Chief State's Attorney, a deputy
4 Chief State's Attorney, a state's attorney, an assistant state's attorney
5 specifically designated by the Chief State's Attorney, or a special
6 assistant state's attorney appointed by the Chief State's Attorney
7 pursuant to subsection (b) of section 51-285 of the general statutes;

8 (2) "Subpoena" means a subpoena ad testificandum or a subpoena
9 duces tecum, or both;

10 (3) "Property" includes, but is not limited to, documents, books,
11 papers, records, films, recordings and other tangible things.

12 Sec. 2. (NEW) In the investigation of conduct that would constitute

13 the commission of a class A or B felony, a prosecuting official, in the
14 performance of such official's duties during such investigation, shall
15 have the authority to compel by subpoena the appearance and
16 testimony of witnesses and the production of property concerning the
17 matter under investigation. No prosecuting official may issue a
18 subpoena under this section to an attorney in regard to a former or
19 current client of such attorney. No prosecuting official may issue a
20 subpoena under this section unless authorized by a judge of the
21 Superior Court pursuant to section 3 of this act.

22 Sec. 3. (NEW) (a) A prosecuting official who seeks to issue a
23 subpoena under section 2 of this act shall submit an application to a
24 judge of the Superior Court. Such application shall include an affidavit
25 sworn to by such prosecuting official stating that such official:

26 (1) Has reasonable grounds to believe that a class A or B felony has
27 been committed, and the facts that form the basis for such belief;

28 (2) Has reasonable grounds to believe that the person to be
29 summoned to appear and give testimony or produce property has
30 information relevant and necessary to the investigation concerning the
31 alleged commission of a class A or B felony, and the facts that form the
32 basis for such belief;

33 (3) Has reasonable grounds to believe that the appearance and
34 testimony of such person or the production of property by such person
35 would not occur or be available without the issuance of a subpoena,
36 and the facts that form the basis for such belief; and

37 (4) Has made reasonable efforts to secure such appearance,
38 testimony and property without recourse to a subpoena and those
39 efforts have been unsuccessful.

40 (b) If the judge finds that the provisions of subsection (a) of this
41 section have been satisfied, such judge may grant the application for

42 the issuance of a subpoena by such prosecuting official.

43 Sec. 4. (NEW) (a) Any subpoena issued pursuant to sections 1 to 12,
44 inclusive, of this act shall (1) compel only the appearance of witnesses
45 and the production of property relevant and necessary to the
46 investigation being conducted, (2) specify with reasonable particularity
47 any property to be produced, and (3) require only the production of
48 documents or records covering a reasonable period of time.

49 (b) Any subpoena issued pursuant to sections 1 to 12, inclusive, of
50 this act shall be served at least five working days prior to the date
51 scheduled for the appearance of the witness, unless a judge of the
52 Superior Court in the judicial district where compliance with the
53 subpoena is sought, as provided in section 5 of this act, otherwise
54 orders for good cause shown.

55 (c) Any subpoena issued pursuant to sections 1 to 12, inclusive, of
56 this act shall contain a notice advising the person summoned of the
57 following: (1) The purpose of the investigation, (2) whether such
58 person is a target or possible target of the investigation, (3) that such
59 person has the right not to be compelled to give evidence against
60 himself or herself, (4) that such person has the right to have counsel
61 present and to consult with such counsel and, if such person is
62 indigent, to have counsel appointed to represent him or her, and (5)
63 that such person has the right to file a motion to quash or modify the
64 subpoena.

65 Sec. 5. (NEW) Any subpoena issued pursuant to sections 1 to 12,
66 inclusive, of this act shall compel the witness to appear or produce the
67 property in the presence of a judge at a specified location in a
68 courthouse in the judicial district where the incident or incidents
69 subject to investigation are alleged to have occurred or, if the
70 investigation is being conducted by a prosecuting official of a judicial
71 district other than the judicial district where the incident or incidents
72 subject to investigation are alleged to have occurred, in a courthouse in

73 that judicial district.

74 Sec. 6. (NEW) If any subpoena is issued pursuant to sections 1 to 12,
75 inclusive, of this act for the production of the medical records,
76 including psychiatric records, of a person, the prosecuting official shall
77 give written notice of the issuance of such subpoena to such person.
78 Such person shall have standing to file a motion to quash the subpoena
79 in accordance with section 9 of this act. All medical records, including
80 psychiatric records, that are produced pursuant to a subpoena issued
81 pursuant to sections 1 to 12, inclusive, of this act, shall be designated as
82 confidential records and maintained in a confidential manner at the
83 office of the Chief State's Attorney until an arrest is made as a result of
84 the investigation.

85 Sec. 7. (NEW) (a) Whenever a subpoena is issued pursuant to
86 sections 1 to 12, inclusive, of this act, the prosecuting official shall, not
87 later than forty-eight hours after service of the subpoena, excluding
88 weekends and holidays, give written notice of the issuance of the
89 subpoena to the presiding judge for criminal matters in the courthouse
90 where compliance with the subpoena is required. Such notice shall
91 include the identity of the person and, if the production of property is
92 compelled, a description of the property. Such notice shall be
93 confidential and not subject to disclosure. The failure to give such
94 notice shall not invalidate the subpoena. Such presiding judge shall
95 assign a judge of the Superior Court to preside over the proceeding.
96 The assignment of such judge shall be confidential and not subject to
97 disclosure. The proceeding shall not be open to the public.

98 (b) Prior to any witness being questioned, the prosecuting official
99 shall advise such person of the following: (1) The purpose of the
100 investigation, (2) whether such person is a target or possible target of
101 the investigation, (3) that such person has the right not to be compelled
102 to give evidence against himself or herself, and (4) that such person
103 has the right to have counsel present and to consult with such counsel

104 and, if such person is indigent, to have counsel appointed to represent
105 him or her. The presiding judge shall assure that such rights are not
106 infringed.

107 (c) A court reporter or assistant court reporter shall make a record of
108 the proceeding. The record of the proceeding shall be sealed and not
109 subject to disclosure, except that any witness who appeared and
110 testified shall be allowed access, at all reasonable times, to the record
111 of such witness' own testimony and shall have the right to receive a
112 copy of the transcript of the record of such testimony.

113 Sec. 8. (NEW) If any witness properly summoned fails to appear or
114 to produce any property specified in the subpoena or, if having
115 appeared, fails to answer any proper question, the prosecuting official
116 may apply to a judge of the Superior Court in the judicial district as
117 provided in section 5 of this act setting forth such failure and
118 requesting an order requiring such person to appear and answer
119 questions or produce such property, as the case may be. If the judge
120 finds that reasonable cause exists, the judge shall issue a citation
121 requiring the witness to appear before a judge of the Superior Court in
122 camera to show cause why such witness should not appear or produce
123 property or should not answer any proper question. If, after hearing,
124 the judge finds that the witness has failed to show cause why such
125 witness should not be required to comply with the subpoena, the judge
126 shall enter an order requiring the witness to appear, to produce
127 property or to answer any proper question, as the case may be. The
128 failure to obey such order may be punished by the court as a contempt
129 thereof. The application of the prosecuting official and the order of the
130 court shall be sealed as to the public and not be subject to disclosure.
131 The hearing on the application shall not be open to the public.

132 Sec. 9. (NEW) (a) Whenever a subpoena has been issued to compel
133 the appearance and testimony of a witness or the production of
134 property pursuant to sections 1 to 12, inclusive, of this act, the person

135 summoned may file a motion to quash the subpoena with the chief
136 clerk of the court for the judicial district as provided in section 5 of this
137 act. No fees or costs shall be assessed.

138 (b) The party filing the motion to quash shall be designated as the
139 plaintiff and the prosecuting official shall be designated as the
140 defendant.

141 (c) The motion, upon its filing, shall be sealed as to the public. The
142 motion shall be referred to the presiding criminal judge of the court for
143 hearing or for assignment to another judge for hearing. Unless
144 otherwise ordered by the judge conducting the hearing, the hearing
145 shall be conducted in camera and the file on the motion shall be sealed
146 as to the public, subject to further order of the court.

147 (d) The motion shall be expeditiously assigned and heard. The date
148 and time of the hearing shall be established by the clerk after
149 consultation with the judge assigned to conduct the hearing. The clerk
150 shall give notice to the parties of the hearing so scheduled.

151 (e) A judge may quash or modify any subpoena issued pursuant to
152 sections 1 to 12, inclusive, of this act for any just cause as may be found
153 by such judge, and shall quash or modify any such subpoena on the
154 following grounds: (1) That the witness summoned does not have
155 information relevant and necessary to the investigation, (2) that the
156 testimony sought is protected by the attorney-client privilege or a
157 statutory or constitutional privilege, or (3) that the production of the
158 property sought would be unreasonable or oppressive or that the
159 property constitutes attorney-client work product.

160 Sec. 10. (NEW) (a) In any investigation conducted pursuant to
161 sections 1 to 12, inclusive, of this act, a state's attorney or, at the request
162 of a special assistant state's attorney, the Chief State's Attorney, may
163 apply to a judge of the Superior Court for an order granting immunity
164 from prosecution to any person whom the state calls or intends to call

165 as a witness if the prosecuting official finds that the testimony of the
166 person is necessary to the investigation of the case. Such immunity
167 may provide that the person will not be prosecuted or subjected to any
168 penalty or forfeiture (1) for or on account of any testimony given or
169 evidence produced by such person, or for or on account of any
170 evidence discovered as a result of or otherwise derived from testimony
171 given or evidence produced by such person, or (2) for or on account of
172 any transaction, matter or thing concerning which such person gives
173 testimony or produces evidence. A person who receives immunity
174 under this subsection shall not be immune from prosecution for
175 perjury or contempt committed while giving such testimony or
176 producing such property.

177 (b) No person who has been properly served with a subpoena
178 pursuant to sections 1 to 12, inclusive, of this act and receives
179 immunity under subsection (a) of this section, shall be excused from
180 appearing and testifying or producing any property before the
181 prosecuting official concerning an investigation pursuant to sections 1
182 to 12, inclusive, of this act upon the ground or for the reason that the
183 testimony or property required of such person may tend to convict
184 such person of a crime or subject such person to a penalty or forfeiture.

185 Sec. 11. (NEW) All information and property obtained by a
186 prosecuting official as a result of the issuance of a subpoena pursuant
187 to sections 1 to 12, inclusive, of this act shall be confidential and not
188 subject to disclosure, except such as should, in the opinion of such
189 official, be used or disclosed in the performance of the official duties of
190 such official. Any exculpatory information obtained with respect to
191 any person shall be disclosed to such person if such person is
192 subsequently arrested.

193 Sec. 12. (NEW) All property produced as a result of the issuance of a
194 subpoena pursuant to sections 1 to 12, inclusive, of this act shall be
195 returned to the person from whom it was received if no criminal

196 prosecution is commenced involving the use of such property or shall
197 be otherwise disposed of as provided by law.

198 Sec. 13. Section 51-296 of the general statutes is repealed and the
199 following is substituted in lieu thereof:

200 (a) In any criminal action, in any habeas corpus proceeding arising
201 from a criminal matter, in any extradition proceeding, [or] in any
202 delinquency matter or in any proceeding in which a witness has been
203 summoned by a subpoena issued pursuant to section 2 of this act, the
204 court before which the matter is pending shall, if it determines after
205 investigation by the public defender or [his] the public defender's
206 office that a defendant or a witness summoned by a subpoena issued
207 pursuant to section 2 of this act is indigent as defined under this
208 chapter, designate a public defender, assistant public defender or
209 deputy assistant public defender to represent such indigent defendant
210 or witness, unless, in a misdemeanor case, at the time of the
211 application for appointment of counsel, the court decides to dispose of
212 the pending charge without subjecting the defendant to a sentence
213 involving immediate incarceration or a suspended sentence of
214 incarceration with a period of probation or the court believes that the
215 disposition of the pending case at a later date will not result in a
216 sentence involving immediate incarceration or a suspended sentence
217 of incarceration with a period of probation and makes a statement to
218 that effect on the record. If it appears to the court at a later date that, if
219 convicted, the sentence of an indigent defendant for whom counsel has
220 not been appointed will involve immediate incarceration or a
221 suspended sentence of incarceration with a period of probation,
222 counsel shall be appointed prior to trial or the entry of a plea of guilty
223 or nolo contendere.

224 (b) In the case of codefendants, the court may appoint one or more
225 public defenders, assistant public defenders or deputy assistant public
226 defenders to represent such defendants or may appoint counsel from

227 the trial list established under section 51-291.

228 (c) Prior to [a defendant's appearance in court] the appearance in
229 court of a defendant in any matter specified in subsection (a) of this
230 section or of a witness summoned by a subpoena issued pursuant to
231 section 2 of this act, a public defender, assistant public defender or
232 deputy assistant public defender, upon a determination that the
233 defendant or witness is indigent pursuant to subsection (a) of section
234 51-297, shall be authorized to represent the defendant or witness until
235 the court appoints counsel for such defendant or witness.

236 Sec. 14. Not later than January 1, 2003, the Chief State's Attorney
237 shall submit a report to the Judiciary Committee of the General
238 Assembly concerning the issuance of subpoenas pursuant to sections 1
239 to 12, inclusive, of this act including, but not limited to, the number of
240 applications submitted for the issuance of a subpoena, the number of
241 applications granted, the purpose of the investigation, the offense or
242 offenses allegedly committed that are the subject of the investigation,
243 the number of motions to quash a subpoena that were filed and the
244 rulings on such motions, the number of applications for an order
245 granting immunity from prosecution and the rulings on such
246 applications, the final results of the investigation and the status of any
247 criminal prosecutions resulting from such investigation.

248 Sec. 15. This act shall take effect October 1, 2001, and shall be in
249 effect until October 1, 2003.

JUD **JOINT FAVORABLE SUBST.**

The following fiscal impact statement and bill analysis are prepared for the benefit of members of the General Assembly, solely for the purpose of information, summarization, and explanation, and do not represent the intent of the General Assembly or either House thereof for any purpose:

OFA Fiscal Note

State Impact: Potential Significant Cost¹

Affected Agencies: Division of Criminal Justice, Public Defenders,
Judicial Department

Municipal Impact: None

Explanation**State Impact:**

The bill would result in additional costs to the Division of Criminal Justice (DCJ) related to the costs of witnesses. These costs could include transportation, lodging, parking, meals (up to \$33/day), childcare and lost wages depending on the circumstances of the witness. The agency would also incur minimal costs related to service of subpoenas and court transcripts (\$1.50/page and \$0.50/copy). In addition, the bill would result in an increase in workload for the DCJ, Public Defenders and the Judicial Department.

Since the bill's investigative authorization is limited to class A and B felonies² and since such use is discretionary, it is anticipated that the use of the bill's procedures would be limited and that in the cases that it is utilized, such costs would not be significant and can be absorbed

¹ OFA defines significant as exceeding \$100,000.

within the normal budgetary resources of the agency. It should be noted, however, that in certain complex cases or if the investigative subpoenas are widely used, these investigations could strain the normal budgetary resources of the agencies involved and either significantly affect other responsibilities of the agencies or require additional funding, the degree of which could be significant.

² According to court statistics, there were over 3,000 class A and B felony offenses in 2000.

OLR BILL ANALYSIS

sSB 1115

AN ACT CONCERNING INVESTIGATIVE SUBPOENAS.**SUMMARY:**

This bill allows a prosecuting official, after authorization by a Superior Court judge, to subpoena a person to testify or produce property necessary and relevant to an investigation into the possible commission of a class A or B felony.

The bill includes provisions for:

1. applying for and quashing subpoenas;
2. advising a person of certain information and rights;
3. enforcing a subpoena after a person fails to appear, produce documents, or answer questions; and
4. granting immunity to a person the state calls or intends to call as a witness.

It also requires the chief state's attorney to report to the Judiciary Committee on the use of subpoenas under the bill by January 1, 2003.

EFFECTIVE DATE: October 1, 2001, but it becomes ineffective on October 1, 2003.

DEFINITIONS

The bill defines a "prosecuting official" as the chief state's attorney, a deputy chief state's attorney, a state's attorney, an assistant state's attorney designated by the chief state's attorney, or a special assistant state's attorney appointed by the chief state's attorney. "Property" includes documents, books, papers, records, films, recordings, and

other things.

APPLICATION FOR SUBPOENA

The bill requires a prosecuting official to apply to a Superior Court judge for a subpoena. The judge can authorize the use of a subpoena if satisfied with the application. The application must include the official's sworn affidavit stating the facts that form the basis for his reasonable belief that (1) a class A or B felony has been committed, (2) the person summoned has necessary and relevant information, and (3) the testimony of the person or production of the property will not occur without a subpoena. The official must also state that reasonable efforts to secure the testimony or property without a subpoena were unsuccessful.

The official cannot subpoena an attorney about a current or former client.

SUBPOENAS

The bill requires the subpoena to (1) compel the appearance of a witness or the production of property relevant and necessary to the investigation, (2) specify with reasonable particularity any property to be produced, and (3) require production of documents or records covering a reasonable period of time.

The subpoena can compel attendance or production of property before a judge at a specific location in a courthouse in the judicial district where the underlying incidents allegedly occurred or where the prosecuting official is.

The subpoena must be served at least five working days before the date scheduled for the witness's appearance. A Superior Court judge in the judicial district where compliance is required can order otherwise for good cause.

The bill requires the subpoena to advise a person and the prosecuting official to advise a witness:

1. of the purpose of the investigation;

2. whether he is the target or possible target of the investigation;
3. of his right not to give evidence against himself; and
4. of his right to have counsel present, to consult counsel, and to have counsel appointed for him if he is indigent.

The subpoena must also advise a witness that he has the right to file a motion to quash or modify the subpoena.

The presiding judge must insure that the witness' rights are not infringed.

The bill allows a public defender to represent an indigent witness summoned by a subpoena and authorizes him to represent the person until the court appoints counsel.

Medical Records

The bill requires a prosecuting official to give written notice to a person whose medical records, including psychiatric records, are subpoenaed. That person has standing to file a motion to quash the subpoena. The medical records are confidential and the office of the chief state's attorney must maintain them in a confidential manner until the investigation results in an arrest.

NOTICE TO JUDGE

The bill requires the prosecuting official to notify in writing the presiding judge for criminal matters in the courthouse where compliance with the subpoena is required within 48 hours of serving the subpoena (excluding weekends and holidays). The notice must include the identity of the person and a description of any property subpoenaed. The judge must assign a Superior Court judge to preside. Failure to notify does not invalidate the subpoena. The notice and assignment of a judge are confidential and cannot be disclosed. The proceedings are not public.

RECORD OF PROCEEDINGS

The bill requires a court reporter or assistant court reporter to make a record of the proceeding. The record must be sealed and cannot be disclosed except that a witness has access to his testimony at any reasonable time and has the right to a copy of the transcript.

QUASHING A SUBPOENA

The bill allows a person summoned to appear or produce property to file a motion to quash a subpoena with the chief clerk of the court in the judicial district where appearance is required. There are no fees or costs for the motion. The motion is sealed. The presiding criminal judge of the court hears the motion or assigns it to another judge for a hearing. The motion must be expeditiously assigned and heard. The clerk consults with the judge to set the date and time of the hearing and gives notice to the parties. Unless the judge orders otherwise, the hearing is conducted in private, and the file is sealed.

The bill allows a judge to quash or modify a subpoena if he finds just cause. He must quash or modify the subpoena if:

1. the witness does not have information relevant and necessary to the investigation;
2. the testimony sought is protected by the attorney-client privilege or a statutory or constitutional privilege; or
3. producing the requested property is unreasonable or oppressive, or the property is an attorney-client work product.

FAILURE TO APPEAR, PRODUCE PROPERTY, OR ANSWER QUESTIONS

When a witness fails to appear, produce property, or answer proper questions, the bill allows a prosecuting official to apply to a Superior Court judge in the appropriate judicial district for an order requiring him to do so. If the judge finds reasonable cause, he must issue a citation requiring the witness to appear before a Superior Court judge in his chambers. The judge, after a hearing, must order the witness to comply with the subpoena if he does not show cause why he should

not answer questions or produce the property. Failing to obey the order is punishable as contempt. The prosecuting official's application and the court order are sealed and cannot be disclosed. The hearing is not open to the public.

IMMUNITY

The bill allows a state's attorney or the chief state's attorney (at the request of a special assistant state's attorney) to apply to a Superior Court judge for a grant of immunity from prosecution for a person the state calls or intends to call as a witness if the testimony is necessary to investigate the case. The immunity can protect against prosecution, penalties, or forfeiture for (1) testimony given or evidence the witness produces, (2) evidence discovered or derived from his testimony or evidence, or (3) any transaction or thing that he testifies or provides evidence about. The person is not immune from prosecution for perjury or contempt committed while giving the testimony or producing the property.

The bill provides that a person properly subpoenaed and given immunity is not excused from testifying or producing property before a prosecuting official because it may tend to convict him of a crime or subject him to a penalty or forfeiture.

CONFIDENTIALITY

The bill makes all information or property obtained by a prosecuting official under a subpoena confidential and prohibits disclosure except as the official decides in the performance of his duties. But any exculpatory information about a person must be disclosed to him if he is later arrested.

PROPERTY

The bill requires property not involved in a criminal prosecution to be returned to the person who produced it or otherwise disposed of according to law.

REPORT TO THE JUDICIARY COMMITTEE

The bill requires the chief state's attorney to report to the Judiciary Committee by January 1, 2003 on the use of subpoenas under the bill, including the:

1. number of subpoenas requested and granted,
2. purpose of the investigations,
3. offenses allegedly committed that are the subject of investigations,
4. number of motions filed to quash subpoenas and the rulings on them,
5. number of applications for immunity from prosecution and the rulings on them, and
6. final results of investigations and the status of criminal prosecutions that resulted from them.

COMMITTEE ACTION

Judiciary Committee

Joint Favorable Substitute

Yea 23 Nay 15